

No. 48430-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

In re Personal Restraint of:

FORREST E. AMOS,

Petitioner.

**Supplemental
Response to Personal Restraint Petition**

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By:

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I. AUTHORITY FOR PETITIONER'S RESTRAINT

The State of Washington is the Respondent in this matter. Petitioner, Forrest E. Amos, is restrained by authority of the judgment and sentence of the Lewis County Superior Court under cause number 13-1-00818-6. A copy of the judgment and sentence is attached to this petition as Appendix A.

II. RESPONSE TO PETITIONER'S CLAIMED GROUNDS FOR RELIEF

- A. Petitioner is time barred from collaterally attacking his judgment and sentence.
- B. Petitioner cannot meet his burden to show his waiver of his right to collateral attack his judgment and sentence was not a voluntary, knowing, and intelligent waiver.
- C. Petitioner's has not met his burden to show the State interfered with his right to counsel.
- D. Petitioner's sentence is legal and not excessive.

III. STATEMENT OF THE CASE

The State will rely upon the factual statement in its original response brief. Procedurally, Amos originally filed a pro se Personal Restraint Petition (PRP), which raised a number of issues, including Ineffective Assistance of Counsel, Prosecutorial Error (Misconduct), the State Interfered with Amos' Right to Counsel, the Trial Court Imposed an Unlawful Sentence in Regards to the Gross-

Misdemeanor Counts, and an issue regarding the State amending the Judgment and Sentence. The State filed a response brief, which answered all of Amos' issues and raised procedural bars, including, the time bar, mixed petition, and that Amos had waived his right to file the petition as part of his plea agreement with the State. Amos filed a pro se reply brief. The State filed a motion to strike portions of the reply brief and Appendix to the brief.

In response to the State's motion to strike this Court entered an order on July 5, 2016. The Order did a number of things, including denying the State's motion and appointing Amos counsel. This Court directed that Amos' appointed attorney must arrange for the transcribing of the necessary hearings and proceedings to resolve issues reasoned in the petition. This Court also directed appointed counsel to designate any necessary Clerk's papers and exhibits. Counsel was also directed to brief any issues raised by Amos, but specifically ordered to address whether Amos' waiver of his right to file a personal restraint petition as part of his plea deal with the State precludes this PRP.

The State will further supplement the facts and record as necessary in its argument below.¹

¹ The State has reordered the argument.

IV. ARGUMENT

A. AMOS IS TIME BARRED FROM COLLATERALLY ATTACKING HIS JUDGMENT AND SENTENCE.

The State rests on its argument set forth in its Response Brief regarding its position that Amos is time barred from filing this petition.

B. AMOS' WAIVER OF HIS RIGHT TO FILE A PERSONAL RESTRAINT PETITION AS PART OF HIS PLEA AGREEMENT PRECLUDES HIM FROM FILING THIS PERSONAL RESTRAINT PETITION.

As a preliminary matter, the State, in its first Response Brief acknowledged that a waiver of collateral attack does not preclude a defendant from filing a collateral attack in regards to a claim of ineffective assistance of counsel. This concession can be found in Section C, footnote 5, found on page 9. State's Response Brief, see, e.g., *Hurlow v. United States*, 726 F.3d 958 (7th Cir. 2013). Therefore, the State concedes that Amos can bring an ineffective assistance of counsel claim.²

The State does not concede that Amos' claim in which he argues the State interfered with his right to counsel is an ineffective assistance of counsel claim. While some of the facts in regards to what occurred during the search warrant and the confiscation of the

² The State rests its substantive briefing regarding the ineffective assistance of counsel claim on its Response Brief.

potential legal materials may be relevant to Amos' ineffective assistance of counsel claim, the actual analysis which Amos, and now his appointed counsel, employ for the interference of counsel claim is not an ineffective assistance of counsel standard. See Petitioner's Supplemental Brief 21-25, 25-29; Petition 4-5, 9-13. This analysis (at least on direct review) calls for a dismissal of the charges when the Court determines the State has interfered with the attorney-client relationship because it is presumed prejudicial. *State v. Perrow*, 156 Wn. App. 322, 331, 231 P.3d 853 (2010). That is the request of Amos in his Petition and it is the analysis his counsel uses in Petitioner's Supplemental Brief. Therefore, any briefing which requests this remedy cannot be said to be an ineffective assistance of counsel claim.

Amos advocates this Court should be applying the same reasoning it uses in allowing an appellant to raise voluntariness issues on direct appeal to voluntariness issues on collateral attack. Petitioner's Supplemental Brief. 16. Amos cites to *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 660 P.2d 263 (1983) to argue a petitioner may raise the issue of the voluntariness of a guilty plea for the first time in a collateral attack. Petitioner's Supplemental Brief 16. The State does not disagree that *In re Hews* states this, but *Hews*

also requires a showing of actual prejudice. *In re Hews*, 99 Wn.2d 87-88. Amos throughout this Supplemental Brief ignores his burden in a collateral attack.

It appears to the State Amos is arguing that one should be able to challenge the voluntariness of his or her guilty plea, the voluntariness of the waiver, and ineffective assistance of counsel in a personal restraint petition even though a person has purportedly waived their right to a collateral attack. Petitioner's Supplemental Brief 19. Amos next states he is now arguing his guilty plea and waiver of right to collateral attack (and appeal) were both involuntary due to ineffective assistance of counsel. *Id.* It is the State's position Amos can argue the voluntariness of his waiver, as the waiver issue was raised as a procedural bar by the State and this Court specifically ordered counsel to address the issue. Amos cannot now argue his guilty plea was involuntary, as he did not make such a claim, beyond that his counsel was ineffective in his original Personal Restraint Petition. Any new issues raised in the supplemental brief are "untimely" unless brought within one year of finality of the Judgment and Sentence. See *In re Pers. Restraint Haghighi*, 178 Wn.2d 435, 441, 445-449, 309 P.3d 459 (2013). As stated above,

the State does not dispute Amos can raise an ineffective assistance of counsel claim.

The State relies upon its legal analysis of the permissibility and voluntariness waiver from its Response Brief. If Amos can challenge the voluntariness of his waiver of collateral attack and right to appeal, which the State is not conceding, he still should be held to the standard required of a petitioner, which it is Amos' burden to show this Court actual prejudice. "[A] personal restraint petitioner must first establish by preponderance of the evidence that a constitutional error has resulted in actual and substantial prejudice." *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 671, 327 P.3d 660 (2014) (internal citations omitted). If the alleged error is not of constitutional magnitude then the petitioner must show the court that there is "a fundamental defect resulting in a complete miscarriage of justice." *Id.*, citing *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007).

Amos again ignores the burden of petitioners on collateral review. Amos cannot show his waiver was involuntary, as there was no ineffective assistance of counsel, as argued in the State's Response Brief. Further, the benefit Amos gained from entering into the plea agreement with the State and giving up his collateral attack

rights cannot be denied. The State agreed to dismiss the third strike offense, which, if Amos had been convicted of Leading Organized Crime, he would have died in prison.

C. THE STATE DID NOT INTERFERE WITH AMOS' RIGHT TO COUNSEL.

The State did not interfere with Amos' right to counsel, as extensively briefed in the State's Response Brief.³ Amos in his Supplemental Brief argues the State has the burden to show beyond a reasonable doubt that Amos was not prejudiced by the State's interference, as prejudice is presumed. Petitioner's Supplemental Brief 25, *citing State v. Pena Fuentes*, 179 Wn.2d 808, 812, 820, 318 P.3d 808 (2014); *State v. Granacki*, 90 Wn. App. 598, 602 n.3, 959 P.2d 667 (1998). Amos ignores that his action is not a direct appeal, and this Court does not apply the direct appeal standard to personal restraint petitions.

It is a fundamental requirement that a petitioner seeking collateral relief show actual prejudice. This requirement has evolved over the last few years. It applies even in cases where on direct appeal the error would be structural. As clarified in *In re Coggin*:

As we explained in *In re Personal Restraint of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014), a

³ The State maintains that Amos has waived his right to file this petition and this argument does not fall within the ineffective assistance of counsel exception to that waiver.

petitioner's burden on collateral review has evolved over the course of several decades. We have required petitioners who collaterally attack their convictions to satisfy a higher burden, recognizing that a personal restraint petition does not substitute for a direct appeal, and different procedural rules have been adopted recognizing this difference. Where a presumption of prejudice is appropriate for direct review in some cases, it may not be appropriate for collateral review. *Stockwell*, 179 Wn.2d at 596-97, 316 P.3d 1007. *Even in those cases where the error would never be harmless on direct review, we have not adopted a categorical rule that would equate per se prejudice on collateral review with per se prejudice on direct review.* "We have limited the availability of collateral relief because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders." *St. Pierre*, 118 Wn.2d [321] at 329, 823 P.2d 492 [1992] (denying relief where issue of defective charging documents was raised for the first time in a personal restraint petition (citing *In re Pers. Restraint of Hagler*, 97 Wn.2d 818, 824, 650 P.2d 1103 (1982))).

In re Pers. Restraint of Coggin, 182 Wn.2d 115, 120, 340 P.3d 810 (2014) (petitioner must show prejudice even where on direct appeal error would be structural and reversal automatic) (emphasis added).

Also on point is *In re Pers. Restraint of Smalls*, 182 Wn. App. 381, 335 P.3d 949 (2014), *review denied*, 182 Wn.2d 1015 (2015), where Division I of the court of appeals held:

A petitioner whose judgment and sentence is facially invalid may obtain relief by *showing that this facial invalidity had a practical effect on his sentence*. A petitioner who makes this showing is entitled only to a remand to the trial court to correct the invalidity but is

not entitled to assert a time-barred challenge to the validity of his plea. *If, like Yates, the petitioner cannot show prejudice caused by the sentencing court, he is not entitled to any relief and his petition will be dismissed.*

Smalls, 182 Wn. App. at 391 (emphasis added).

Therefore, it is Amos' burden to show he was prejudiced by the State's actions in this case. Amos' conclusory statements, alleging misconduct by the State with no proof of such misconduct, is not enough to meet his burden. Petitioner's Supplemental Brief 27-8. The petitioner must support the petition with the facts upon which the claim of unlawful restraint rests, and he may not rely solely on conclusory allegations. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990); *In re Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010); RAP 16.7(a)(2)(i). Amos asserts the material seized during the execution of the search warrant was read (Amos does not state by whom, but the State assumes Amos is alleging either the officer and/or the deputy prosecutor). Petitioner's Supplemental Brief 28. Amos has zero admissible evidence to support such a claim. See Petitioner's Supplemental Brief.

The record actually shows the State did not look at Amos' legal paperwork. As stated in State's Response Brief, Officer Haggerty collected the material from Amos' jail cell and did not read

a single item, with the exception of noting which papers clearly were in regards to DOC matters. Appendix L, N.⁴ According to Officer Haggerty's report, which was written contemporaneously and submitted on June 19, 2014,

Amos's main concern was that I would be seizing documents for his civil lawsuit against the Washington State Department of Corrections. I assured Amos that I would not take anything that was obviously related to that case.

Appendix N. Therefore, when Officer Haggerty entered the cell, he filtered through paperwork looking at the heading and contents to identify if it was DOC lawsuit, but he did not read paperwork that was clearly not in regards to the DOC matter. Appendix L, N. The seized items were taken to the Centralia Police Department, without being read and examined by anyone, and placed into the evidence locker awaiting an *in camera* review by a judge to determine what material could be reviewed by the officers and what material was privileged attorney client information. Appendix L, M, N.

This version is supported by Amos' own trial counsel's statements to the trial court during an omnibus hearing on July 10, 2014. RP (7/14/10) 10. Trial counsel stated:

⁴ The cites to Appendixes are to the Appendixes in the State's Response Brief it filed in April 2016.

I talked with the prosecutor this morning, and apparently the items that were seized are sitting in a box untouched waiting for a judge to go through it and determine what the police can have and what the police cannot have, apparently.

Id. The Deputy Prosecutor then stated, “What we need is an in-camera review of the items that were taken as a result of the search warrant to determine what is or what is not work product or attorney-client communications.” RP (7/10/14) 11.

With this record, Amos has not met his burden to show the State interfered with his attorney-client privileged communications, let alone that he was prejudiced by the State’s conduct in regards to the execution of the search warrant on his cell. This Court should dismiss this Petition.

D. THE TRIAL COURT’S SENTENCE OF 144 MONTHS IS A LAWFUL SENTENCE.

The State rests on its argument set forth in its Response Brief regarding the lawfulness of Amos’ 144 month sentence.

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V. CONCLUSION

Amos is time barred from collaterally attacking his judgment and sentence. Amos cannot meet his burden to show this Court that his waiver of his collateral attack was not a knowing, voluntary, and intelligent waiver. Further, Amos may not raise for the first time, in this supplemental brief, the voluntariness of his guilty plea. Amos has not met his burden to show the State interfered with his right to counsel beyond making conclusory statements and allegations not based on admissible facts and evidence. Finally, the trial court's sentence on the gross-misdemeanors was lawful. This Court should dismiss the petition.

RESPECTFULLY submitted this 31st day of January, 2017.

JONATHAN MEYER
Lewis County Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'J. Meyer', written over a horizontal line.

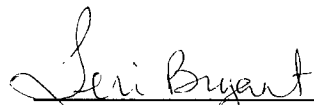
by: _____
SARA I. BEIGH, WSBA 35564
Attorney for the Respondent.

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

IN THE PERSONAL)	NO. 48430-7-II
RESTRAINT PETITION OF:)	
)	DECLARATION OF
FORREST E. AMOS,)	MAILING
)	
Petitioner,)	
_____)	

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 31, 2017, petitioner, Forrest E. Amos was served with a copy of the State's **Supplemental Response to Personal Restraint Petition** via Division II upload to Peter B. Tiller, attorney for petitioner at: Kelder@tillerlaw.com and ptiller@tillerlaw.com.

DATED this 31st day of January, 2017, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

January 31, 2017 - 2:36 PM

Transmittal Letter

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Personal Restraint Petition (PRP)

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Supplemental Response to Personal Restraint Petition

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

A copy of this document has been emailed to the following addresses:

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